STATE OF MICHIGAN

COURT OF APPEALS

FRANK D. MOLLHAGEN, NINA H. MOLLHAGEN, and MARGARET JAYNE CLEMENT, TRUSTEE OF THE MARGARET JAYNE CLEMENT TRUST,

Plaintiffs-Appellees,

v

ALLEGAN COUNTY BOARD OF ROAD COMMISSIONERS, a/k/a ALLEGAN COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
January 14, 2003

No. 230316
Allegan Circuit Court
LC No. 97-021775-CZ

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment on jury verdict in favor of plaintiffs in the amount of $308,205 for Frank and Nina Mollhagen and $293,737.64 for Margaret Jayne Clement. We affirm.

On June 20-21, 1997, a severe storm occurred in Allegan County, resulting in the destruction of plaintiffs' homes when the land supporting them eroded, and they crashed onto the Lake Michigan shore. Plaintiffs sued defendant Allegan County Road Commission on a theory of trespass-nuisance and governmental taking. Following trial, the jury returned a verdict in favor of plaintiffs on the trespass-nuisance claim. The trial court denied defendant's motion for summary disposition, directed verdict, and judgment notwithstanding the verdict (or in the alternative) a new trial. This appeal followed.

On appeal, defendant first contends the trial court erred when it denied its motion for summary disposition brought pursuant to MCR 2.116(C)(7), (8), and (10). We review rulings on motions for summary disposition de novo. *Derbabian v S & C Snowplowing*, 249 Mich App 695, 701; 644 NW2d 779 (2002).

When reviewing a grant of summary disposition, pursuant to MCR 2.116(C)(7) we review the complaint "to determine whether facts have been pleaded justifying a finding that recovery in tort is not barred by governmental immunity." *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996), citing *Harrison v Dep't of Corrections*, 194 Mich

App 446, 449; 487 NW2d 799 (1992). Although our Supreme Court held in *Pohutski v City of Allen Park*, 465 Mich 675, 689-690, 699; 641 NW2d 219 (2002), that there is no trespass-nuisance exception to governmental immunity, the decision was held to apply prospectively only. As such, the instant case is analyzed under the trespass-nuisance framework set out in *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), rev'd by *Pohutski*, *supra*.

Plaintiffs argue that this case falls within the trespass-nuisance exception to governmental tort immunity recognized in *Hadfield*, *supra*, 430 Mich 169. Plaintiffs allege that the elements of 1) condition (nuisance or trespass); 2) cause (physical intrusion); and 3) causation or control (by government) were sufficiently pleaded. *Id*. Defendant argues that the trespass-nuisance exception is not applicable because its drainage system was "normally adequate," and because the storm was an "act of God." Defendant's assertion that its drainage system was "normally adequate" is essentially an argument that it was not negligent, and therefore cannot be held liable for trespass-nuisance. However, our Supreme Court explicitly noted that

> [w]hile a governmental entity must have been a proximate cause of the injury, "the source of the intrusion" need not originate from "government-owned land." Moreover, "[n]egligence is not a necessary element of this cause of action." This is true even if an instrumentality causing the trespass-nuisance was "built with all due care, and in strict conformity to the plan adopted by" a governmental agency or department. [*Peterman v DNR*, 446 Mich 177, 205, n 42; 521 NW2d 499 (1994) (citations omitted.)]

Defendant also argues that its motion for summary disposition should have been granted on the basis that the storm was an "act of God," and therefore, defendant should have been relieved of all liability. We recognize that an "act of God" is an affirmative defense, however, the defense is only applicable if the act of God "is the sole proximate cause of the injury." *Smith v Bd of Co Road Comm'rs of Chippewa Co*, 381 Mich 363, 367; 161 NW2d 561 (1968). "[W]hen an act of defendant concurs with an act of God as a cause of the injury, defendant is liable." *Id*. Here, the intervening event of a severe rainstorm will not relieve defendant of liability where the rainstorm/act of God is part of the very nature of the nuisance involved. See *Continental Paper v Detroit*, 205 Mich App 404, 411; 521 NW2d 844 (1994), rev'd on other grounds by *Continental Paper v Detroit*, 451 Mich 162; 545 NW2d 657 (1996). It was sufficient that defendant set in motion the physical intrusion (water trespassing onto plaintiffs' properties) by failing to abate the nuisance (installing large culverts which increased the velocity with which water invaded plaintiffs' properties). *Id*.

Our review of the record reveals that plaintiffs set forth ample evidence in their affidavits, pleadings, depositions, admissions, and other documentary evidence on which the trial court could properly deny a motion for summary disposition. Plaintiffs owned residences in Glenn Shores subdivision on Lake Michigan where defendant admitted responsibility for maintaining a county road and drainage system consisting of ditches and culverts. In 1996, defendant replaced three culverts near plaintiffs' properties, and added an additional culvert. One of the existing culverts was enlarged from fifteen to eighteen inches, and the other two existing culverts were enlarged from ten to twelve inches. The new culvert was twelve inches in diameter. These changes to the drainage system increased the water flow capacity, and when a severe storm occurred on June 20-21, 1997, the water invaded plaintiffs' properties at such an

increased velocity due to defendant's enlargement of the culverts, that the soil beneath plaintiffs' homes eroded until the structures crashed into a newly formed gully.

When viewing the evidence in the light most favorable to the plaintiffs, it is evident that the trial court properly denied defendant's motion for summary disposition. Under MCR 2.116(C)(7), the motion should be denied unless no factual development could provide a basis for recovery. *Peters, supra*, 215 Mich App 486. Because the facts indicate that the trespass-nuisance exception to governmental immunity is applicable, the trial court properly denied defendant's motion for summary disposition on this basis.

Under MCR 2.116(C)(8), the motion should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Peters, supra*, 215 Mich App 487. Because the pleadings stated a claim of trespass-nuisance on which relief could be granted, the trial court properly denied defendant's motion for summary disposition on this basis.

Under MCR 2.116(C)(10), the motion should be granted where there is no genuine issue regarding any material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). Because plaintiffs established a genuine issue of material fact regarding the elements of the trespass-nuisance claim, the trial court properly denied defendant's motion for summary disposition on this basis.

Defendant next argues that the trial court erred in denying its motion for directed verdict. We disagree. We review rulings on motions for a directed verdict de novo. *Derbabian, supra*, 249 Mich App 701. See also *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's decision, we review the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Derbabian, supra,* 249 Mich App 702. A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. *Id.*

Defendant's argument for directed verdict was that it could not be found liable for trespass-nuisance because the evidence indicated that the second element of cause (physical intrusion) was missing. Defendant contended that because the evidence indicated that the same amount of water would have made its way to plaintiffs' properties regardless of whether the drainage system was in place, all defendant's drainage system did was increase the velocity with which the water flowed onto plaintiffs' properties.

Plaintiffs' expert Andrew Blystra testified that even though the water would have eventually found its way to plaintiffs' properties regardless of whether there was a drainage system, defendant's drainage system delivered the water to the outlet by the Mollhagen's property faster than if the system would not have existed. He further testified that but for the county road drainage system, the Clement and Mollhagen properties would not have been destroyed. Our Supreme Court has specifically held that "while one may dispose of the surface waters upon his land he may not concentrate the waters and pour them through artificial ditches in greater quantities and with greater velocity than would be natural, or as sometimes stated, one is entitled to receive the waters as they were wont to flow in their natural state." *Steele v City of Ionia*, 209 Mich 595, 599; 177 NW 259 (1920).

Our Supreme Court has also held that "[w]hile one has a right to drain and dispose of the surface water upon his land, yet he cannot lawfully concentrate such water, and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent proprietor." *Bennett v County of Eaton*, 340 Mich 330, 336; 65 NW2d 794 (1954). We have held that "the owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water." *Lewallen v City of Niles*, 86 Mich App 332, 334; 272 NW2d 350 (1978).

It is clear that a question of fact existed upon which reasonable minds could differ. Therefore, the trial court was correct in denying defendant's motion for directed verdict. When viewing the evidence in a light most favorable to the non-moving party, a question of fact existed on which reasonable minds could differ; i.e., whether defendant's drainage system caused the water to invade plaintiffs' properties more quickly than it would have in the absence of the drainage system, thus fulfilling the second element (cause/physical intrusion) of a trespass-nuisance claim. Because a directed verdict is only appropriate when no factual question exists on which reasonable jurors could differ, the trial court's ruling was correct. *Derbabian, supra,* 249 Mich App 702.

Defendant next argues that the trial court erred in not granting defendant's motion for judgment notwithstanding the verdict (or in the alternative) a new trial, because the evidence showed that the water that destroyed plaintiffs' properties resulted solely from an act of God, and because the testimony of plaintiffs' expert was discredited. We disagree.

This Court reviews rulings on motions for judgment notwithstanding the verdict de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party." *Id*. "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261, citing *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

"In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party." *Morinelli, supra*, 242 Mich App 261, citing *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). "This Court must determine whether the trial court abused its discretion in ruling with regard to a motion for a new trial. Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence." *Id*.

As noted above, while an "act of God" is an affirmative defense, the defense is only applicable if the act of God "is the sole proximate cause of the injury." *Smith, supra*, 381 Mich 367. "When an act of defendant concurs with an act of God as a cause of injury, defendant is liable." *Id*. Defendant argues that there was no basis for the jury to fail to embrace the act of God defense. To the contrary, plaintiffs put forth sufficient evidence from which reasonable jurors could have honestly reached different conclusions as to whether defendant's drainage system, taken in conjunction with the "100-year storm," was sufficient to hold defendant liable on a trespass-nuisance theory. *Morinelli, supra*, 242 Mich App 260-261. Therefore, the trial court correctly let the jury verdict stand. *Id*. at 261.

Similarly, regarding defendant's motion for new trial (in the alternative), it cannot be said that the "overwhelming weight of the evidence" favors defendant. Although much testimony was presented regarding the severity of the storm, there was certainly not "overwhelming evidence" that the storm was the sole cause of the destruction of plaintiffs' properties. Rather, sufficient evidence was presented from which the jury could conclude that defendant's drainage system, combined with the "100 year" storm, caused the water to invade and destroy plaintiffs' properties, thereby establishing a trespass-nuisance case. In light of the fact that we give substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence, we find that the trial court did not abuse its discretion in denying defendant's motion for new trial. *Morinelli, supra*, 242 Mich App 261.

Defendant next argues that the trial court erred in denying it a judgment notwithstanding the verdict (or in the alternative) a new trial, because the testimony of plaintiffs' expert Blystra was incompetent to establish that its drainage system was part of the cause of the destruction of plaintiffs' properties. As noted above, Blystra put forth sufficient evidence from which reasonable jurors could have honestly reached different conclusions as to whether the fact that defendant's drainage system increased the velocity with which water invaded plaintiffs' properties was sufficient to establish a claim of trespass-nuisance. As noted, our Supreme Court has specifically held that "while one may dispose of the surface waters upon his land, he may not concentrate the waters and pour them through artificial ditches in greater quantities and with greater velocity than would be natural." *Steele, supra*, 209 Mich 599. Therefore, the trial court correctly let the jury verdict stand.

Similarly, regarding defendant's motion for new trial (in the alternative), it cannot be said that the "overwhelming weight of the evidence" favors defendant. Sufficient evidence was presented from which the jury could conclude that the fact that defendant's drainage system increased the velocity with which the water invaded and destroyed plaintiffs' properties was enough to establish a prima facie case of trespass-nuisance.

Defendant next argues that the trial court erred in allowing testimony that defendant had the authority to petition the Drain Commissioner for construction of an outlet drain, because defendant did not have the legal authority to do so. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or "the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

On appeal, defendant is apparently arguing that the trial court abused its discretion in overruling the objection on relevance grounds, because it was not at all relevant to the determination of a trespass-nuisance or takings claim, and it only served to confuse the jury. "Generally, all relevant evidence is admissible, and irrelevant evidence is not admissible." *Ellsworth, supra*, 236 Mich App 188-189. "Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence." *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129;

594 NW2d 841 (1999); see also MRE 401. On cross-examination of Blystra, defense counsel attempted to elicit testimony that defendant had no legal authority to do anything regarding what happened to the water once it left the roadway and entered the private sector. Defendant cannot now argue that it was error to let plaintiffs' counsel pursue the issue on redirect. Defendant made the issue relevant by probing the scope of defendant's authority on cross-examination. We therefore find that the trial court did not abuse its discretion in permitting the testimony. *Chmielewski, supra*, 457 Mich 614.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Pat M. Donofrio